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No. 79-1709.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

THOMAS J. ALBERNAZ AND EDWARD RODRIGUEZ,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief for the Petitioners.

MARTIN G. WEINBERG,
JUDITH H. MIZNER,
OTERI & WEINBERG,
10 Post Office Square,
Boston, Massachusetts 02109
(617) 227-3700
Attorneys for Petitioner Albernaz.

RAYMOND E. LAPORTE,
408 Madison Street,
Tampa, Florida 33602
(813) 621-4771
Attorney for Petitioner Rodriguez.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Questions Presented.*

I. Did Congress intend to permit the imposition of consecutive sentences where a single conspiracy with the dual objectives of importing and distributing marijuana has been subdivided into a two-count indictment charging a conspiracy to import marijuana in violation of 21 U.S.C. § 963 in count I and a conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 in count II?

II. Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution preclude the imposition of cumulative punishment upon conviction for a single conspiracy charged as two separate statutory violations in a single criminal proceeding even if Congress intended that multiple penalties be imposed?

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*In addition to petitioners Albernaz and Rodriguez, Peter Smigowski and William John Martins were parties to the initial proceedings in the United States Court of Appeals for the Fifth Circuit. They were not parties to the en banc review.

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Brief for the Petitioners.

Opinions and Judgments Below.

Following a jury trial in the United States District Court for the Southern District of Florida (Atkins, J.), petitioners Thomas Albernaz and Edward Rodriguez were convicted of conspiracy to import marijuana (count I) and conspiracy to distribute marijuana (count II) in violation of 21 U.S.C. §§ 846 and 963. Both received consecutive sentences.

Petitioners appealed from the judgments of the District Court entered on May 26, 1977. Their convictions were affirmed by a panel of the United States Court of Appeals for the Fifth Circuit on November 14, 1978. The court's opinion is reported at 585 F.2d 1234 (5th Cir. 1978), and is reproduced in A.-C.P.* at 1a-21a. On its own motion, the court ordered rehearing en banc on November 20, 1978, limited to the question of the propriety of the imposition of consecutive sentences (A.-C.P. 22a-25a).

Petitioners' convictions were affirmed by the court, en banc, on February 27, 1980. The opinion, reported at 612 F.2d 906 (5th Cir. 1980) (en banc), is reproduced in A.-C.P. at 26a-55a.

The time for filing a petition for a writ of certiorari was enlarged to April 27, 1980 by Mr. Justice Powell (A.-C.P. 56a), and a petition was filed on that date. Certiorari was granted on October 6, 1980. (J.A. 18.)**

Jurisdiction.

The original judgment of the Court of Appeals was entered on November 14, 1978, and affirmed, en banc, on Febru-

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*"A.-C.P." refers to the Appendix to Albernaz' and Rodriguez' Petition for a Writ of Certiorari.

**"J.A." refers to the Joint Appendix filed with this brief.

ary 27, 1980. The time for filing a petition for a writ of certiorari was enlarged to April 27, 1980, by Mr. Justice Powell. Certiorari was granted on October 6, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved.

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> [N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . ..

21 U.S.C. § 841 provides in pertinent part:

> *Prohibited Acts A — Unlawful acts*
>
> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 846 provides:

> *Attempt and conspiracy*
>
> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the

maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 952 provides in pertinent part:

Importation of controlled substances — Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that —

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary for the medical, scientific, or other legitimate needs of the United States —

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that the competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General may prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

21 U.S.C. § 963 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Statement of the Case.

On December 26, 1976, petitioner Albernaz and DEA agent Theodore Weed, posing as a man with a boat and access to other boats, began negotiations for Weed to offload 15,000-20,000 pounds of marijuana from a freighter at sea and bring it back into a port. Over the course of the next month, Weed was introduced to petitioner Rodriguez and other individuals purportedly acting with petitioners. There were a number of meetings between Weed, Albernaz, Rodriguez and others with a number of plans and changes of plans as to the amount of marijuana involved, the boat to be used, and the selection of an offload site (A.-C.P. 5a-6a).

On January 27, 1977, a vessel crewed by DEA agents, Customs Agents, and DEA civilian employees left West Palm Beach to meet the freighter 200-225 miles east of the United

States. They were to offload 1,100 bales of marijuana weighing approximately fifty pounds each. Two days later petitioners and another individual chartered a plane to assist in the rendezvous, which was not completed due to darkness. The following day the rendezvous was made; the offloading began; the Coast Guard was called; the cargo was seized and thirteen men on board the freighter were arrested.* Petitioners and two others were arrested in Miami that night (A.-C.P. 6a-7a).

A grand jury sitting in the Southern District of Florida returned a two-count indictment charging eighteen individuals, including petitioners, with conspiracy to import marijuana in violation of 21 U.S.C. § 963 (count I) and conspiracy to distribute marijuana in violation of 21 U.S.C. § 846 (count II). But for the reference to importation in count I and distribution in count II, and the citation to different subsections of Title 21 of the United States Code, the two counts were identical; each charged, in precisely the same language, the same eighteen persons with a conspiracy extending from mid-December, 1976, to February 1, 1977, at Fort Lauderdale, Florida, and other places, involving thirty tons of marijuana and containing the exact same overt acts — a series of meetings and inspection of offload sites (J.A. 8-13).

Albernaz, Rodriguez and two others were tried jointly and convicted on both counts (J.A. 2). All but one received consecutive sentences. Albernaz was sentenced to a 3½ year term of imprisonment on each count with the sentences to be served consecutively, for a total sentence of seven years imprisonment. Rodriguez received consecutive sentences of 4½ years confinement for a total sentence of nine years imprisonment (J.A. 3).**

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*The thirteen members of the crew were charged as co-conspirators and tried separately.

**Petitioners also received special parole terms on each count, to be served consecutively.

On appeal, the court affirmed petitioners' two convictions. Although determining that there had been only one conspiracy and stating that, if free to do so, it would not affirm the imposition of consecutive sentences, the panel felt constrained to uphold the sentences under prior case law of the Circuit (A.-C.P. 17a).

Rehearing, en banc was limited to the question of whether "[i]f the same agreement is charged as a violation of both 21 U.S.C. § 846 and 21 U.S.C. § 963 and the defendants are convicted of both offenses, may separate sentences be imposed for each offense?" (A.-C.P. 22a-23a). The court affirmed the sentences, finding a single agreement, but holding that the only relevant question was whether Congress intended to permit the imposition of consecutive sentences, and answering that question in the affirmative. According to the court below, this Court "has recognized that the Double Jeopardy Clause imposes no limits on Congress's power to define the allowable unit of prosecution and punishment, at least so long as all charges are brought in a single proceeding" (A.-C.P. 48a).

Summary of Argument.

I. Whether Congress intended to authorize multiple punishment where, as here, a single conspiracy with dual objectives has been charged as violating the two conspiracy provisions of the Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. *et seq.*) is a question that remains shrouded in ambiguity. Examination of the statutory structure and its legis-

lative history demonstrates that the existence of two conspiracy provisions in the Act can be attributed to Congressional resolution of a committee jurisdiction problem and an intent to ensure that all conspiracies, whether domestic or international in scope be punished, rather than an intent to impose multiple punishment for participation in a single conspiracy with multiple objectives.

Other tools of statutory construction similarly fail to disclose the requisite clear, unambiguous intent. The *Blockburger* test is not the sole method of determining whether the two charged offenses are the same. Moreover, because of the nature of conspiracy — the fact that the offense lies in the agreement and not its objectives — makes it an inappropriate benchmark for divining a legislative intent to impose multiple punishment for a single agreement charged as violative of two conspiracy provisions. Examination of the inconsistent charging practices of the government (which has charged conspiracy violations of both statutory provisions both in single counts and multiple counts) and the conflict in the circuits as to legislative intent, further supports a conclusion that Congress has not spoken with the clarity required to justify a determination of unambiguous intent to impose multiple punishment where as here a single conspiracy with a dual objective has been charged in two counts. Accordingly, under the rule of lenity — which does, and must, apply to the statutes involved here — the ambiguity must be resolved against the imposition of multiple punishment and consecutive sentences must be held impermissible under the circumstances involved here.

II. Although the definition of offenses and permissible punishment is within the Congressional sphere, the scope of

that sphere is not unlimited. The constitutional protections of the Double Jeopardy Clause against multiple punishment for the same offense cannot be legislatively nullified. Under certain circumstances, such as those present here, the courts must independently examine multiple convictions to determine whether, in fact multiple punishment has been imposed for the same offense. Because of the nature of conspiracy — the fact that, as a crime of agreement, it may be described in many ways — where two conspiracy charges are involved that scrutiny requires going beyond the *Blockburger* test and examining the charging instrument and facts of the case to ensure that where multiple punishment is imposed it is imposed for participation in two conspiracies and not a single conspiracy with multiple objectives, such examination here reveals only a single conspiracy and, therefore, permits the imposition of but a single punishment.

Argument.

Introduction.

With the proliferation of statutory offenses, the analytical framework to be employed in determining when multiple punishment may be imposed for separate statutory violations arising out of one criminal transaction is a question that is seen with increasing frequency, and is one which has divided this Court. Does the Double Jeopardy Clause provide substantive protection against multiple punishment for the same offense even where the court finds of legislative intent to permit the imposition of multiple punishment, as suggested in *Jeffers* v.

United States, 432 U.S. 137 (1977);* *Simpson* v. *United States*, 435 U.S. 6 (1978);** and *Whalen* v. *United States*, U.S. , 100 S.Ct. 1432 (1980)?*** Or, as has been suggested by some members of this Court in concurring and dissenting opinions,**** are the metes and bounds of the Double Jeopardy Clause, as applied to the question of multiple punishment, delimited by legislative intent?

As will be set forth, *infra*, petitioners submit that the two tier analysis suggested by this Court in *Simpson* and *Jeffers* is constitutionally mandated; that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution may, under certain circumstances, prohibit multiple punishment regardless of legislative intent. However, as also set forth *infra*, petitioners maintain that regardless of the outcome

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*"The critical inquiry is whether Congress intended to punish each statutory violation separately. . . . If some possibility exists that the two statutory offenses are the 'same offense' for double jeopardy purposes, however, it is necessary to examine the problem closely, in order to avoid constitutional multiple-punishment difficulties." 432 U.S. at 155.

**"Cases in which the Government is able to prove violations of two separate criminal statutes with precisely the same factual showing, as here, raise the prospect of double jeopardy. . . . Before an examination is made to determine whether cumulative punishments for the two offenses are constitutionally permissible, it is necessary . . . to determine whether Congress intended to subject the defendant to multiple penalties for the single criminal transaction in which he engaged." 435 U.S. at 11-12.

***"If this case had come here from a United States Court of Appeals, we would as a matter of course first decide the . . . statutory claim and, only if that claim were rejected, would we reach the constitutional issue." 100 S.Ct. at 1435.

"The Double Jeopardy Clause *at the very least* precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." *Id.* at 1436 (emphasis added).

****See *Whalen* v. *United States*, *supra*, at 1440, 1441 and 1443 (White, J., concurring, Blackmun, J., concurring, and Rehnquist, J. and Berger, C.J., dissenting) and *Busic* v. *United States*, ___ U.S. ___, 100 S.Ct. 1747, 1756, 1759 (1980) (Blackmun, J. and Berger, C.J., concurring and Rehnquist, J., dissenting).

of this analytic controversy, the sentences imposed in this case are statutorily and constitutionally impermissible. No legislative intent to impose consecutive sentences where a single conspiracy is charged as a violation of two separate statutory provisions of 21 U.S.C. § 801 *et seq.* can be found, and, in the absence of a clear expression of legislative intent, consecutive sentences may not be imposed.*

I. EXAMINATION OF THE LEGISLATIVE HISTORY AND APPLICATION OF RELEVANT TOOLS OF STATUTORY CONSTRUCTION DO NOT RESOLVE THE STATUTORY AMBIGUITY CREATED BY THE EXISTENCE OF TWO CONSPIRACY PROVISIONS IN THE SAME LEGISLATIVE ENACTMENT, AND DO NOT PERMIT A FINDING OF CLEAR CONGRESSIONAL INTENT TO IMPOSE MULTIPLE PUNISHMENT UPON CONVICTION OF A SINGLE CONSPIRACY CHARGED IN TWO COUNTS AS VIOLATING BOTH CONSPIRACY PROVISIONS.

PREFACE.

Surely, the mere fact that two conspiracy sections exist is not, alone, sufficient to find the requisite affirmative intent to impose multiple punishments where, as here, the charged violations of both sections are based on a single criminal agree-

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*The court below, although recognizing that the charges in counts I (conspiracy to import) and II (conspiracy to distribute) of the indictment in this case constituted a single criminal transaction — a single agreement with a dual objective — found both that Congress intended to permit the imposition of consecutive sentences where one agreement violates both conspiracy provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (P.L. 91-513, codified in relevant part, at 21 U.S.C. § 801 *et seq.*), and that the consecutive sentences did not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Petitioners submit that the decision below was predicated on an erroneous analysis of the statutory structure and its legislative history and an unduly restrictive construction of the Double Jeopardy Clause, and that accordingly, it must be reversed.

ment. Neither provision in any way specifies whether consecutive sentences are Congressionally authorized where a single criminal conspiracy transgresses both provisions. Thus, in light of the nature of the question involved, the existence of the two provisions necessitates, rather than precludes, further inquiry. As in *Simpson* v. *United States, supra,* 435 U.S. at 10, the provisions constitute "the beginning and not the end of the analysis necessary to answer the question for our decision." See also, *Whalen* v. *United States, supra*; *Busic* v. *United States, supra,* and *Jeffers* v. *United States, supra* for cases in which this Court has found the need to resolve Congressional intent to impose multiple punishments for violations of two statutory provisions.

A. *Analysis of Legislative Intent Must be Informed by the Rule of Lenity.*

Whether legislative intent is the first question or the only question, this Court must determine whether Congress intended to permit the imposition of consecutive sentences where a single conspiratorial agreement is charged in two counts as violative of two separate statutory provisions. As stated in *Whalen* v. *United States,* U.S. , 100 S.Ct. 1432, 1436 (1980), "[t]he Double Jeopardy Clause at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." See also, *Simpson* v. *United States*, 435 U.S. 6 (1978); *Jeffers* v. *United States*, 432 U.S. 137 (1977).

A finding of congressional intent to authorize double punishment for a single conspiracy can only be predicated on a clear, unambiguous expression of congressional purpose; an indefinite intent — "a guess as to what Congress intended" [*Ladner* v. *United States*, 358 U.S. 169, 178 (1958)] — will not suffice. Indeed, as this Court emphasized in *Bell* v. *United States*, 349 U.S. 81, 83 (1955), in reversing a double punishment under the Mann Act:

> It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Thus, in determining whether pyramided penalties were intended, the court must apply the "established rule of construction that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'." *Simpson* v. *United States*, 435 U.S. 6, 14 (1978). See also, *Ladner* v. *United States*, 358 U.S. 169, 177-178 (1958); *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222 (1952); *Whalen* v. *United States*, U.S. , 100 S.Ct. 1432, 1439 (1980).*

The majority opinion of the court below is premised in substantial part on its conclusion that because Congress viewed drug offenses as a problem to be attacked with severity, the rule of lenity does not apply to construing the intended scope of the drug control laws. This position has been, and must be, clearly rejected. In *Bifulco* v. *United States*, U.S. , 100 S.Ct. 2247 (1980), this Court specifically stated that its examination of one of the statutory provisions involved here (21 U.S.C. § 846) "must be informed by the policy that the Court has expressed as 'the rule of lenity'." *Id.* at 2252. And, in construing legislative intent in connection with 21 U.S.C. § 846 and another provision of the same Act (21 U.S.C. § 848), this Court refused to permit cumulative punishment,

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* That the rule of lenity applies to the interpretation of penalty provisions as well as the interpretation of substantive criminal offenses cannot be questioned. As this Court recently stated in interpreting another aspect of one of the provisions involved here (21 U.S.C. § 846):

> the Court has made it clear that this principle of statutory construction [the rule of lenity] applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *Bifulco* v. *United States*, U.S. , 100 S.Ct. 2247, 2252 (1980).

finding the legislative history "inconclusive" — a result which again implies application of the rule of lenity. *Jeffers* v. *United States, supra*, 432 U.S. at 156.

Case law in other areas similarly refutes a conclusion that the applicability of the rule of lenity hinges on the perceived severity of the offenses involved. Certainly, killing a human being and rape are to be condemned as severely as drug offenses. Yet the rule of lenity was applied in construing legislative intent in regard to those offenses in *Whalen* v. *United States*, U.S. , 100 S.Ct. 1432, 1440 (1980). Although Congress intended to deal severely with the abuse of firearms, the rule of lenity has been applied in analyzing congressional intent as to the permissible punishment for violations of separate statutes proscribing their use. See e.g., *Simpson* v. *United States, supra*; *Busic* v. *United States, supra*. Bank robbery, which carries a 20 year penalty, is also viewed as a serious offense. Yet the rule of lenity has also been applied in construing various provisions of the Federal Bank Robbery Act, 18 U.S.C. § 2113. See e.g., *Prince* v. *United States*, 352 U.S. 322 (1957); *Heflin* v. *United States*, 358 U.S. 415 (1959).

Nor could the rule of lenity logically be limited to offenses perceived as less serious. In resolving statutory ambiguity against the imposition of more severe criminal sanctions, the rule is founded on and effectuates two long-standing policies: first, a policy of providing fair warning in commonly understood language as to "what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be *clear*;" and, second, a policy embodying the "instinctive distastes against men languishing in prison unless the lawmaker has *clearly* said they should." *United States* v. *Bass*, 404 U.S. 336, 348 (1971)(emphasis added). These fundamental principles of warning and certainty before the imposition of criminal sanctions should be, and are, applicable to all criminal offenses; premising their application on the perceived nature of the offense raises substantial questions of

due process. See e.g., Weston & Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review 81, 117-118.

Analyzing the meaning of the statutory provisions involved here, informed by the rule of lenity, petitioners submit that, contrary to the decision below, any Congressional intent to authorize the imposition of consecutive sentences on an individual convicted of a single conspiracy with a dual objective charged under 21 U.S.C. § 846 and 21 U.S.C. § 963, remains, at best, shrouded in ambiguity.

B. *The Statutory Structure and Legislative History Do Not Disclose a Clear Congressional Intent to Impose Multiple Punishment For a Single Conspiracy.*

The two statutory provisions involved here are part of the Comprehensive Drug Abuse and Prevention Control Act of 1970, P.L. 91-513, 84 Stat. 1236, codified, in relevant part as 21 U.S.C. § 801 *et seq.*, (hereinafter referred to as "the Act") — a comprehensive set of provisions designed to deal with all aspects of the problems of drug abuse prevention and control. Analysis of the statutory structure of the Act and of its legislative history demonstrates, if anything, the *absence* of the requisite unambiguous congressional intent to cumulatively punish a single conspiracy with a dual objective, showing, instead, that the intent of Congress in enacting two conspiracy provisions had nothing to do with multiple punishment considerations but was simply a manifestation of an intent to punish all conspiracies, whether domestic or international in scope.

The Act, described in detail in the margin,* is structurally divided into separate subchapters addressed to the regulation

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*The Comprehensive Drug Abuse and Prevention Control Act of 1970, P.L. 91-513, was enacted in three titles. Title I, not relevant to this case,

of domestic use/misuse of drugs designated as controlled dangerous substances (subchapter I), and the regulation of im-

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concerns rehabilitation programs relating to drug abuse, and is codified in Title 42 of the United States Code.

Title II of P.L. 91-513 (the "Controlled Substances Act") constitutes Subchapter I of Chapter 13 of Title 21 of the United States Code, entitled "Control and Enforcement" (21 U.S.C. §§ 801-904). It is subdivided into six parts.

Part A, "Introductory Provisions" sets forth Congressional findings and declarations, definitions, and funding (21 U.S.C. §§ 801-803).

Part B, "Authority to Control: Standards and Schedules" defines the method for classifying controlled substances, and establishes and defines five schedules of controlled substances (21 U.S.C. §§ 811, 812).

Part C, "Registration of Manufacturers, Distributors, and Dispensers of Controlled Substances" sets out requirements for the registration of persons involved in the lawful manufacture, distribution and dispensing of controlled substances, labelling, production quotas, and the regulation of registrants (21 U.S.C. §§ 821-829).

Part D, "Offenses and Penalties" establishes three groups of unlawful acts and the penalties for violation of any offense in each group. The unlawful acts are domestic offenses — manufacture, distribution, dispensing, possession with intent to manufacture, distribute or dispense controlled or counterfeit substances (21 U.S.C. § 841), and various offenses by registrants (21 U.S.C. §§ 842, 843). Simple possession and distribution to persons under the age of 21 are dealt with separately (21 U.S.C. §§ 844, 845). The statutory scheme then makes punishable attempt or conspiracy "to commit any offense defined in the subchapter" (21 U.S.C. § 846) and makes special provisions for continuing criminal enterprises (21 U.S.C. § 848) and dangerous special drug offenders (21 U.S.C. § 849).

Part E, "Administrative and Enforcement Provisions" regulates, *inter alia*, warrants and forfeiture proceedings (21 U.S.C. §§ 871-886).

Part F, "General Provisions" contains severability and savings provisions (21 U.S.C. §§ 901-904).

Title III of P.L. 91-513 (the "Controlled Substances Import and Export Act") constitutes subchapter II of Chapter 13 of Title 21 of the United States Code entitled "Import and Export" (21 U.S.C. §§ 951-966). Following a general definitional section (21 U.S.C. § 951), it defines unlawful importation (21 U.S.C. § 952) and exportation (21 U.S.C. § 953), regulates transshipment and intransit shipment (21 U.S.C. § 954), possession on board departing and arriving vessels, aircrafts and vehicles (21 U.S.C. § 955) and exemptions (21 U.S.C. § 956), requires and regulates registration for import and export (21 U.S.C. §§ 957-958) and makes external manufacture or distribution for purposes of unlawful importation unlawful (21 U.S.C. § 959). It then sets forth prohibited acts and penalties (21 U.S.C. §§ 960-962) — acts which are concerned solely with violations of the provisions of this subchapter — and makes punishable attempt or conspiracy "to commit any offense defined in this subchapter" (21 U.S.C. § 963). Administrative and judicial proceedings under this subchapter are governed by Part E of subchapter I (21 U.S.C. § 965).

portation and exportation of such substances (subchapter II). The House Report accompanying passage of the Act, explains that the statutory division between purely domestic offenses, on the one hand, and offenses relating to importation and exportation on the other, was a by-product of the intricacies of committee jurisdiction in the House of Representatives. H.R. No. 91-1444, reprinted in 1970 U.S. Code, Cong. and Adm. News, pp. 4566-4660. Because the proposed legislation originally submitted to Congress by the President included the repeal of certain tax and other laws which, up until that time, had been used to control narcotic drugs, the legislation was first referred to the House Committee on Ways and Means (*Id.*, p. 4567).* Following hearings, that committee "decided to consider only the provision relating to imports and exports of narcotic drugs, marijuana, and depressant and stimulant drugs . . . ," (*Id.* at 4567), and transferred the remaining provisions — relating to domestic regulation and control — to the Interstate and Foreign Commerce Committee. *Id.* When the legislation was reported from the committees to the floor of the House of Representatives, the division between purely domestic provisions and import-export provisions was maintained. However, as the House Report makes clear, maintenance of this bifurcated approach cannot be imputed to punishment considerations:

> the reported bill is based upon the provisions of the legislation heretofore discussed, with the form in which

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*Since the President's proposed legislation also dealt with drugs regulated under the Federal Food, Drug and Cosmetic Act, the legislation was initially divided into two bills — "in general, identical, except with respect to the drugs covered by their provisions" (*Id.* at 4567) — with the Ways and Means Committee considering the bill covering narcotic drugs and marijuana and the Interstate and Foreign Commerce Committee considering the bill covering other drugs.

> the bill is reported being designed to preserve the jurisdiction of the Ways and Means Committee over future amendments to this legislation relating to imports and exports of drugs covered by the bill (*Id.* at 4567-4568).

It was in that reported, dual-form that the bill was finally enacted.

This background not only demonstrates the statutory ambiguity insofar as congressional intent to authorize multiple punishment following conviction of a single conspiracy with dual objectives is concerned, but, moreover, it affirmatively supports a conclusion that the dual structure of the Act was simply the result of a congressional concern with *committee jurisdiction*.

Nor does the remainder of the legislative history provide any affirmative indication, much less specific exposition, of a clear congressional intent to authorize double punishment for participation in a single drug conspiracy by the inclusion of a conspiracy provision in each subchapter of the Act. The summary of the bill contained in House Report 91-1444 does not mention the conspiracy provisions at all (1970 U.S. Code, Cong. and Adm. News, *supra*, pp. 4568-71). Nor does the table comparing the then extant penalties and the revised penalties for illegal import or export include any reference to conspiracy. *Id.*, p. 4640. The section by section analysis contains no reference to the conspiracy provisions, other than to state that they exist (*Id.*, pp. 4617, 4646). Finally, the Conference Report (No. 91-1603, *Id.*, pp. 4657-4660) says nothing about the conspiracy provisions. The congressional debates are similarly devoid of any indication that Congress even *considered* the possibility of multiple punishment for a single conspiracy with objectives on both sides of the subchapter division. Insofar as they focus on the penalty scheme at all, the floor debates key in on the fact that the legislation would abolish the scattered plethora of prior statutory drug prohibi-

tions, abandon mandatory minimum sentencing requirements which many felt had been counterproductive, and substitute a flexible and balanced comprehensive penalty structure, rationally related to the classification system established in the legislation. See, e.g., 116 Cong. Rec. 33296-33318, 33614-33667. The floor debates like the House Report and Conference Report, are absolutely *silent* as to the intent behind the enactment of two conspiracy provisions. Moreover, in discussing passage of the House Bill, the Senate noted its similarity to the previously passed Senate version (S. 3246) and Senator Dodd stated that "no significant changes were made [from the Senate to the House version]." The Senate bill, however, contained only a single conspiracy provision similar to the provisions of the House bill. Petitioners submit that this lack of perception of any significant difference between the two versions further illustrates the absence of any clear congressional intent to impose multiple punishment for a single conspiracy and supports their contention that the existence of two conspiracy provisions rather than one resulted solely from a structural solution to a problem of committee jurisdiction.

Thus, in light of the congressional silence as to any affirmative intent to impose multiple punishment for participation in a single conspiracy with multiple objectives — and given the structural explanation for the existence of the two conspiracy provisions — petitioners submit that the inclusion of a conspiracy section in each subchapter cannot be read to reflect anything more than a congressional intent to ensure that all drug conspirators, whether involved in domestic or international traffic would be punished — an intent to ensure that no individual involved in a drug conspiracy would slip through the net because of the divided structure of the statutory scheme.*

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*Nor can an intent to impose double punishment for one drug conspiracy be inferred from the mere fact that Congress decided to include conspiracy

Nonetheless, on the basis of the concededly "sparse" (A.-C.P. 39) legislative history, the court below found a specific intent to impose consecutive sentences for the single conspiracy proved here stating that this was "carefully drafted legislation" evidencing "a great deal of coordination between the two committees" (A.-C.P. 39a), it found the existence of parallel penalty structures in the subchapters significant because the penalties were different from those initially proposed by the President. Finally, it found the passage of an amendment providing that the two conspiracy provisions would take effect at the same time "indicative of the nonaccidental nature of the two specific conspiracy provisions." (*Id.*)

None of these factors, either individually or collectively, address the particular intent issue raised in this case.* Petitioners do not contest that the congressional committee coordination indicates that Congress recognized it was enacting two conspiracy provisions and that they were, in that sense, "nonaccidental." That finding, however does not lead to or justify the conclusion that the intent was to authorize consecutive sentences for a single conspiracy with multiple objectives charged as violating both provisions.

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provisions in the Act even though a conspiracy to commit a substantive offense proscribed by the Act would be punishable under the general conspiracy provision of 18 U.S.C. § 371. In light of the congressional silence, the inclusion of conspiracy provisions in the Act cannot be read as anything more than an intent to provide a flexible and balanced penal scheme for inchoate offenses linked to the flexible penalties established for substantive drug offenses. While 18 U.S.C. § 371 provides for a maximum term of imprisonment of *five years*, 21 U.S.C. §§ 846 and 963 provide that conspiracy may be punished within a range extending *from probation to 30 years imprisonment*. See 21 U.S.C. §§ 841-845 and §§ 960-962.

* The changes in penalty structure between the President's proposed legislation and the enacted legislation are irrelevant to the question involved here. They consisted primarily of a rejection of mandatory minimum sentences for substantive offenses, changes resulting from Congressional perception that a flexible approach would obviate undesirable law enforcement problems presented by such sentences in the past. Although adoption of a flexible approach expanded the range of permissible penalties for substantive offenses, the penalty for conspiracy remained unchanged. Thus, this change says nothing about the intent to impose multiple punishment for a single conspiracy.

C. *The Blockburger Test Is an Inappropriate Tool of Statutory Construction for Resolving Congressional Intent to Authorize Multiple Punishment for a Single Conspiracy.*

As the final prong of its statutory analysis, the court below construed the statutory provisions under the *Blockburger* test.* Although recognizing its limited utility as a tool of statutory interpretation, as opposed to a double jeopardy test (A.-C.P. 41a), the court found that its application supported a conclusion that Congress intended to impose consecutive sentences under the circumstances of this case. (*Id.*, at 42a.)

Strictly defined, *Blockburger* requires only an examination of statutory elements:

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. 284 U.S. at 304.

However, in *Whalen* v. *United States, supra*, this Court appears to have eschewed a rigid focus on the statutory elements. There the government claimed that since the felony murder statute under examination proscribed a killing in the course of committing any of six enumerated offenses including rape, rape was not a necessary element of a felony murder conviction; therefore, the offenses were not "the same" under the *Blockburger* test and cumulative punishment could be imposed upon conviction of both offenses. Rejecting this narrow formulation, this Court examined the case before it and de-

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*The test is derived from *Blockburger* v. *United States*, 284 U.S. 299 (1932).

termined that the offenses were the same: "[i]n the present case . . . proof of rape is a necessary element of proof of the felony murder . . . ." 100 S.Ct. at 1439. See also, *Harris* v. *Oklahoma*, 433 U.S. 682 (1977). Thus, petitioners submit that strict application of the *Blockburger* test cannot be used as a determinative benchmark for divining legislative intent.* They further maintain that it is a particularly inappropriate tool for construing conspiracy statutes; that the nature of the crime of conspiracy demands a broader analysis, encompassing examination of the facts of the case to determine whether, as a factual matter, there were two crimes committed or only one.

The purpose behind the criminalization of conspiracy is, as this Court has stated, based on the fact that:

> "collective criminal agreement — partnership in crime — presents a greater potential threat to the public than individual delicts. . . . [T]he danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise," *Ianelli* v. *United States*, 420 U.S. 770, 778 (1975), quoting *Callanan* v. *United States*, 364 U.S. 587, 593-594 (1961).

Thus, it is the agreement which constitutes the offense and its criminal nature is neither enhanced nor lessened by the number of objects encompassed within its contemplated scope. See, e.g., *Braverman* v. *United States*, 317 U.S. 49, 53 (1942):

> Whether the object of a single agreement is to commit one or many crimes, it is in either case that agreement

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* Moreover, as further noted in *Whalen*, *supra*, "There may be instances in which Congress has not intended cumulative punishments even for offenses that are different under [the *Blockburger* test]." 100 S.Ct. at 1439, n.7.

> constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one.

See also, *Jeffers* v. *United States*, *supra* at 147 ("The essence of the crime of conspiracy is agreement,"), *Frohwerk* v. *United States*, 249 U.S. 204, 210 (1919).*

Because the offense of conspiracy lies in the agreement and not its objects, and the agreement may be single despite a plethora of objectives, strict application of the *Blockburger* test proves too much. Applied to the indictment described in *Braverman* v. *United States*, *supra*, it would demonstrate seven conspiracies — despite this Court's finding of a single conspiracy. Accordingly, *Blockburger* is a totally inadequate basis, both for determining whether a number of separately charged conspiracies, divided by the object offenses, are in fact a single conspiracy with multiple objectives,** and for determining Congressional intent in enacting the two conspiracy provisions involved here.

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* Lower courts as well have often noted that criminal conspiracy penalizes the agreement and not its objectives. See, e.g., *United States* v. *Bolts*, 558 F.2d 316, 325 (5th Cir. 1977), *cert. denied*, 434 U.S. 930, 99 S.Ct. 262 (1978); *United States* v. *Fruit*, 507 F.2d 194, 195 (6th Cir. 1974); *United States* v. *Noah*, 475 F.2d 688, 693 (9th Cir.), *cert. denied*, 414 U.S. 1095, 94

Applying a broader analysis, and examining the charges and facts in the instant case, it is patently clear that petitioners engaged in only a single conspiracy. This is not a case in which an individual has agreed to import marijuana with one group and made a separate agreement to distribute marijuana with another group. Nor is it a case in which an individual has agreed to import marijuana and, later, entered into a second, separate agreement to distribute. In these hypothetical instances, there are two separate agreements for which an individual has agreed to import marijuana and, later, entered into a second, separate agreement to distribute. In these hypothetical instances, there are two separate agreements for which an individual could receive consecutive sentences. Here, however, the court below explicitly found that petitioners had entered into a single agreement with multiple objectives — a single agreement that affords a single basis for conspiratorial liability and, accordingly, must permit imposition of but a single punishment.*

D. *Prosecutorial and Judicial Treatment of the Statutory Provisions Involved here Demonstrate the Absence of a Clear Congressional Intent to Impose Multiple Punishment for a Single Conspiracy.*

The statutory ambiguity is further illustrated by the fact that, while here, the government subdivided a single con-

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* Since the offense of conspiracy has traditionally been defined as proscribing an agreement, regardless of the number of its objectives, even if this Court were to reverse this longstanding understanding and hold, contrary to prior decisions, that the number of conspiracies is defined by the number of objectives, petitioners submit that such a radical shift could not be relied upon to uphold the results below. Rather, such a construction, applied retroactively, would constitute "an unforeseeable judicial enlargement of a criminal statute" and would violate due process. See, e.g., *Brown* v. *Ohio*, 432 U.S. 161, 169 n.8 (1977).

spiracy into two separate counts, in numerous other cases it has charged a single conspiracy to import and distribute in *one count*. *See, e.g., United States* v. *Bolts*, 558 F.2d 316 (5th Cir. 1977) (conspiracy to commit violations of 21 U.S.C. §§ 841(a)(1), 843(b), 952 and 960 charged in one count); *United States* v. *Martinez*, 496 F.2d 664 (5th Cir. 1974) (conspiracy to violate 21 U.S.C. §§ 952(a) and 841(a)(1), charged in one count); *United States* v. *Archbold-Newball*, 554 F.2d 665 (5th Cir. 1977) (conspiracy to import with intent to distribute charged in one count); *United States* v. *See*, 505 F.2d 845 (9th Cir. 1974) (conspiracy to import, distribute and possess marijuana in violation of 21 U.S.C. §§ 846 and 963 charged in one count); *United States* v. *Leong*, 536 F.2d 993 (2d Cir. 1976) (conspiracy to export from Asia into the United States and to possess and distribute in the United States in violation of 21 U.S.C. §§ 846 and 963 charged in one count). If Congress had unambiguously intended for the conspiracies in the above cited cases to constitute two separate offenses those charges would be duplicitous. Thus, the inconsistency between the position the government has taken here, and what it did in the cases cited above, supports a finding of the *absence* of a clear congressional intent to impose consecutive sentences for a single conspiracy with objectives straddling the statutory subchapter division.

A final indication that the congressional intent is, at best, *unclear* arises from the fact that different United States Courts of Appeal have come to exactly opposite conclusions about what Congress intended. One circuit has concluded that Congress did *not* mean, by its enactment of both §§ 846 and 963, to authorize the imposition of multiple punishments for one conspiracy. *United States* v. *Honneus*, 508 F.2d 566, 569 (1st Cir. 1974). Other circuits have found that Congress *did* intend to permit double punishment where both of these provisions were violated. *United States* v. *Marotta*, 518 F.2d 681,

685 (9th Cir. 1975,* *United States* v. *Garner*, 574 F.2d 1141 (4th Cir. 1978), cert. denied, 439 U.S. 936; *United States* v. *Rodriguez*, 612 F.2d 906 (5th Cir. 1980). Plainly, had Congress expressed its intent in the clear unambiguous way required to justify the imposition of consecutive sentences for participation in a single conspiracy with dual objectives, such sharp disagreement as to congressional intent could not arise.

As demonstrated by the analysis above, examination of the legislative history and proper application of relevant tools of statutory construction do not lift the cloud of ambiguity and reveal a clear congressional intent to inflict double punishment for a single conspiracy with dual objectives straddling the ar-

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*The ambiguity as to congressional intent is further illustrated by the confusion in the *Marotta* court's analysis. According to that court's determination of congressional intent, "Congress has in effect determined that a conspiracy to import drugs with intent to distribute is twice as serious as a conspiracy to import for personal use or a conspiracy to possess with intent to distribute." 518 F.2d at 685. In making this assertion, the *Marotta* court was apparently under the mistaken impression that a "conspiracy to import for personal use," like a "conspiracy to possess with intent to distribute," would violate only *one* of the two conspiracy provisions. But what the *Marotta* court apparently failed to notice is that while a "conspiracy to possess with intent to distribute" would, indeed, violate only § 846 (because only one substantive offense — that of possession with intent to distribute — in violation of § 844, would be implicated), a "conspiracy to import for personal use" would violate *both* § 846 *and* § 963 (because not one, but two substantive offenses would be implicated: importation in violation of § 960, and "personal use," which is the equivalent of simple possession, in violation of § 844). Therefore, under the *Marotta* court's view of the statutory scheme, a "conspiracy to import for personal use" could, just like a "conspiracy to import with intent to distribute," result in the imposition of double punishment — despite the court's belief that Congress had determined that "conspiracy to import for personal use" was less serious than "conspiracy to import with intent to distribute."

Because the *Marotta* court's analysis demonstrates its own misunderstanding of the statutory scheme, and because it ignored, or failed to take into account, the legislative history set forth in the text, *supra*, petitioners submit that any reliance on its conclusion is misplaced.

tificially created subchapter lines. In the absence of explicit indication by Congress, intent to impose multiple punishment cannot be assumed; where, as here, the legislative record permits nothing more than "a guess as to what Congress intended" (*Bifulco* v. *United States*, *supra*, U.S. , 100 S. Ct. at 2252), the still vital policy of lenity (see *Bifulco*, *supra*; *Busic*, *supra*; *Whalen*, *supra*; *Simpson*, *supra*) mandates that multiple penalties for a single conspiracy charged under both 21 U.S.C. § 846 and 21 U.S.C. § 963 be proscribed as a matter of statutory construction.

II. The Double Jeopardy Clause Prohibits the Imposition of Multiple Punishment in a Single Criminal Proceeding for Violations of Separate Conspiracy Statutes Constituting the "Same Offense".

If this Court finds no clear Congressional intent to impose multiple punishment for a single conspiracy with a dual objective charged in two counts under 21 U.S.C. § 846 and 21 U.S.C. § 963, it need go no further; the consecutive sentences must be vacated and the case must be remanded for resentencing. If, however, contrary to petitioner's contention (see Argument I, *supra*), this Court finds that by enacting the two conspiracy provisions Congress did specifically and unequivocally intend to authorize multiple punishment for a single conspiracy it must then determine what, if any, limitations the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution places on the imposition of consecutive sentences in a single criminal proceeding where it is contended that different statutory violations constitute "the same offense."

Although the definition of criminal offenses and the prescription of punishment for violation of those offenses is with-

in the legislative province (see, *Whalen* v. *United States*, *supra*, 100 S.Ct. at 1436), this power is not, as this Court has also recognized, free from constitutional restraints. *Id.* at 1436, n.3, and cases cited therein. And a majority of this Court has indicated that one of the constitutional limitations is the prohibition against multiple punishment for the same offense imposed by the Double Jeopardy Clause.

Effectuation of this constitutional protection — which constitutes one of the primary purposes of the Double Jeopardy Clause (see, e.g., *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977); *North Carolina* v. *Pearce*, 395 U.S. 711 (1969)) — requires, in certain instances, an independent judicial assessment of multiple convictions claimed to penalize "the same offense" regardless of legislative intent, for Congress is not free to legislatively override the Constitution. See, e.g., *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975). Thus, petitioners submit that if the multiply-charged offenses, in fact, constitute a single offense, only one punishment may be imposed, regardless of legislative intent. Anything less would leave the scope of the Double Jeopardy Clause totally dependent on legislative and prosecutorial whim and render it, in substantial part, a nullity.

To prevent this legislative nullification where the separately charged offenses alleged to be "the same" are conspiracy charges, courts must go beyond a superficial *Blockburger* analysis. Because of the nature of a conspiracy — an inchoate crime, a crime of agreement (see Argument I, *supra*) — charges that are distinct offenses under the *Blockburger* test may well be simply artificially subdivided fragments of a single conspiracy.

Therefore, in analyzing double jeopardy claims in conspiracy cases, a number of courts have recognized that because the nature of a conspiracy is such that it can be alleged in many different forms, other standards must be applied. Accord-

ingly, these courts have looked at the facts of the case to determine if, as a factual matter, there were two crimes committed or only one. See, e.g., *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974), cert. denied, 420 U.S. 995 (1975); *United States* v. *Papa*, 533 F.2d 815, 820 (2d Cir. 1976), cert. denied, 429 U.S. 961 (1976); *United States* v. *Young*, 503 F.2d 1072, 1075 (3d Cir. 1974); *United States* v. *Palermo*, 410 F.2d 468 (7th Cir. 1969).

Indeed, this Court has recognized the difficulty of applying the *Blockburger* test to a conspiracy situation, stating in *Braverman* v. *United States*, 317 U.S. 49, 54 (1942):

> Since the single continuing agreement, which is the conspiracy here, thus embraces its criminal objects, it differs from successive acts which violate a single penal statute and from a single act which violates two statutes. See *Blockburger* v. *United States*, 284 U.S. 299, 301-304 . . ..

Given these differences, where multiple conspiracies are alleged, this Court should require examination of the terms of the charging indictment(s) and the facts alleged and an independent assessment as to whether, in fact, more than one conspiracy exists. Only if such scrutiny reveals multiple conspiracies, and not a single conspiracy with multiple objectives, can consecutive sentences constitutionally be imposed.*

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*If, contrary to petitioners' contention in this Argument, this Court determines that congressional intent defines the scope of the Double Jeopardy Clause where multiple punishment for a single criminal transaction is imposed in a single criminal proceeding, the expression of legislative purpose must be unmistakably clear. Heightened scrutiny and strict resolution of any ambiguity against a finding of intent to impose multiple punishment must form the predicates for any determination to permit dual penalties; without stringent examination the protections of the Double Jeopardy Clause will become an empty shell, a mere form without substance.

In this case, currently applied standards of review cannot reveal a clear congressional intent to impose multiple punishment for the single conspiracy involved here. Heightened scrutiny will, *a fortiori*, fail to disclose an unmistakable intent.

Such an examination here demonstrates that in the case at bar only one conspiracy — and, therefore, one offense — existed. The consecutive sentences were, therefore, imposed in violation of the Double Jeopardy Clause.

Conclusion.

For all the aforementioned reasons, the decision below must be vacated and the case remanded for resentencing.

Respectfully submitted,

MARTIN G. WEINBERG,
JUDITH H. MIZNER,
OTERI & WEINBERG,
10 Post Office Square,
Boston, Massachusetts 02109.
Attorneys for
Petitioner Albernaz.

RAYMOND E. LAPORTE,
408 Madison Street,
Tampa, Florida 33602.
Attorney for
Petitioner Rodriguez.